

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MATTHEW RAYMOND,

Plaintiff,

vs.

18-CV-1467

TROY MITCHELL, et al.,

Defendants.

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Transcript of a Telephone Conference held on
October 27, 2020, the HONORABLE ANDREW T. BAXTER,
United States Magistrate Judge, Presiding.

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(By Telephone)

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1 (The Court and all counsel present by
2 telephone, 2:30 p.m.)

3 THE COURT: All right, good afternoon, this is
4 Judge Baxter. This is Raymond v. Mitchell, et al.,
5 9:18-CV-1467, can I have the appearances for plaintiff,
6 please?

7 MS. ROSENFELD: Sure. Good afternoon, your Honor,
8 this is Katie Rosenfeld from Emery Celli for plaintiff
9 Matthew Raymond, and my colleague Emma Freeman is also on the
10 phone with me.

11 MS. LERNER FREEMAN: Good afternoon, your Honor,
12 this is Emma.

13 THE COURT: Good afternoon, all right. For the
14 Auburn Correctional Facility defendants?

15 MR. MACKEY: Good afternoon, your Honor --

16 MS. PERRI ROBERTS: Good afternoon -- go ahead,
17 Pat.

18 MR. MACKEY: Sorry, your Honor, this is Patrick
19 Mackey on behalf of all defendants other than defendant Geer.

20 MS. PERRI ROBERTS: No, Patrick, actually it's, we
21 represent defendant Geer, it's defendant Aimee Hoppins who's
22 represented by --

23 MR. MACKEY: I'm sorry, I said Geer, I meant
24 Hoppins.

25 THE COURT: Okay. There's another lawyer for that

1 group?

2 MS. MEYERS BUTH: Judge, Cheryl Meyers Buth on
3 behalf of Aimee Hoppins, good afternoon.

4 MS. BAKER: Good afternoon, Judge, and Laurie Baker
5 on behalf of Aimee Hoppins as well.

6 THE COURT: Okay. All right. We have anybody else
7 on the line?

8 MS. COWAN: Yes, your Honor, this is Aimee Cowan
9 for the John Doe defendants.

10 THE COURT: Okay.

11 MS. COWAN: Sorry.

12 THE COURT: That's all right. All right. Is that
13 everybody?

14 MR. COVERT: Your Honor, Barry Covert and Diane
15 Roberts, I don't know if you announced but we're also on, we
16 are with Patrick Mackey, co-counsel with Mr. Mackey.

17 THE COURT: Okay. All right. So we have a couple
18 of issues to address today. The first relates to the request
19 from the plaintiff that I enter an order and, protective
20 order, I guess, to disclose some information relating to an
21 FBI investigation that may implicate at least defendant
22 Mitchell. Have there been any new developments with respect
23 to that, have the parties discussed that any further or
24 anything like that?

25 MS. ROSENFELD: Your Honor, this is Ms. Rosenfeld,

1 there have not beyond the submission of the letters to the
2 court.

3 THE COURT: Okay. So I did communicate with Tom
4 Spina who is the Assistant U.S. Attorney in this district who
5 is sort of the liaison between the various FBI or Justice
6 Department lawyers involved in the *Touhy* review. My purpose
7 in doing so was to try to see if they wanted to participate
8 in this conference, which they ultimately decided not to.
9 But I did get some additional information from him with
10 respect to the government's position so I'm going to say a
11 little bit about that, and then we'll see if we can sort out
12 how to proceed here.

13 I do not think that the FBI's current position
14 constitutes a finding that the relevance of the requested
15 investigative records outweighs the privacy interests of the
16 persons referenced in the report in the supporting documents.
17 The FBI is reviewing the report and in the process of
18 gathering supporting investigative documents and they are
19 still waiting to make a determination as to whether they will
20 comply with the subpoena based on the *Touhy* standards.

21 Mr. Spina tells me that as of late last week when I
22 spoke with him or maybe earlier in the week, they needed
23 about 30 more days to continue their review before starting
24 to crystallize their position. The government has reserved
25 its right to assert privilege with respect to the documents

1 which could include a determination that the law enforcement
2 privilege should be invoked, for example, to protect sources
3 from harm, or to protect the privacy of persons referenced
4 who were not charged with crimes.

5 The contours of the law enforcement privilege are
6 examined in, among other cases, *Miller v. Mehltreter*, a
7 Western District of New York case from 2007 reported at 478
8 F.Supp.2d 415 at 424. While the government lawyers would be
9 happy to have the court make a ruling with respect to the
10 Privacy Act issues so they could cover their bases and reduce
11 the burden of review and redaction, they have not taken the
12 position that disclosure is appropriate under Privacy Act
13 standards pending further review of the documents.

14 Now the Privacy Act standards for me to consider in
15 whether to order disclosure of these documents are for the
16 most part the usual standards for discovery under the Federal
17 Rules including concepts of proportionality. The case law
18 seems to agree that the Privacy Act does not create a
19 privilege or require a showing of compelling need to overcome
20 privacy interests, but it calls for a more considered and
21 cautious balancing of the harm caused by disclosure versus
22 the relevant need and proportionality considerations. And
23 sort of the classic case that articulates the standards for
24 deciding whether the court should issue an order compelling
25 disclosure of documents covered by the Privacy Act is a

1 District of Columbia Circuit case from 1987, *Laxalt v.*
2 *McClatchy*, which is reported at 809 F.2d 885 at 888 to 889,
3 and at least for now I'm not going to recite those standards
4 in detail. But district courts in the Second Circuit have
5 applied the *Laxalt* standards in deciding when to issue
6 disclosure or protective orders under the Privacy Act with
7 some variation in emphasis. So a few -- I'll cite a few
8 cases by way of example, *Pascal Abidor, National Association*
9 *of Criminal Defense Lawyers v. Johnson*, an Eastern District
10 of New York case from June 2nd, 2016, reported at 2016 WL
11 3102017, at *7, which held that while documents covered by
12 the Privacy Act "may be released pursuant to court order, in
13 making a decision to release such information, 'the court
14 must 'accord proper weight to the policies underlying ...
15 statutory protections, and ... compare them with the factors
16 supporting discovery in a particular lawsuit.'" ... "[t]his
17 analysis includes a balancing of 'the need for disclosure
18 against potential harm to the subject of disclosure.'" There's quite a bit of internal quotation marks that I'm not
19 going to bother trying to sort out while I'm doing this
20 orally.
21

22 I'd also cite *Upstate Shredding, LLC v. Ferrous,*
23 *Inc.*, a Northern District of New York case from March 2nd,
24 2016, reported at 2016 WL 865299, at *17, and that held, and
25 I'm quoting, "The 'protected interests' in the Privacy Act

1 'reflect a congressional judgment that certain delineated
2 categories of documents may contain sensitive data which
3 warrants a more considered and cautious treatment' in
4 discovery.... "Procedurally, then, whether the District Court
5 considers a request for a Privacy Act order in the discovery
6 context it must consider the use of protective orders and the
7 possibility of in camera inspection.'"

8 There's also an earlier Northern District of
9 New York case which applies the *Laxalt* standards, that would
10 be *Mary Imogene Bassett Hospital v. Sullivan*, 1991 case from
11 this district, 136 F.R.D. 42 at 49.

12 So I'm going to make a few comments with respect to
13 the submissions the parties have made so far just to sort of
14 guide further consideration and discussion of this issue.

15 I would disagree with the plaintiff's suggestion
16 that the discovery they seek from the FBI does not create a
17 burden on anyone. It certainly maybe doesn't create a burden
18 on the defendants but it has created a substantial burden on
19 the FBI to gather and review records from an investigation
20 that was completed almost 15 years ago. And I would note
21 that the Federal Rules of Civil Procedure are particularly
22 protective of nonparties in evaluating the burden from
23 discovery demands. That's established in the Rules of Civil
24 Procedures Rule 45(d)(1). And with all due respect, I think
25 the defendants got it completely backwards on the

1 significance of the Privacy Act in this particular case. To
2 the extent that the FBI report implicates named defendants in
3 excessive force or other similar misconduct, that weighs in
4 favor of disclosure in this action despite the defendants'
5 privacy interests. There are clearly other factors that
6 would determine relevance, including the fact that the
7 investigation looked into conduct nine or more years before
8 the incidents in this case, and that no named defendants were
9 charged or were disciplined. But with -- I don't have a lot
10 of details but I do have some sense from my discussion with
11 Tom Spina that at least defendant Mitchell is referenced in
12 the report. To the extent the FBI report implicates others,
13 in particular nonparties, in misconduct, that is when the
14 relevance of the information to this action weakens and the
15 privacy interests of nonparties becomes more compelling.

16 At the end of the day, I believe I need to evaluate
17 the extent to which the report provides relevant evidence of
18 misconduct of defendants named in this case to be able to do
19 the balancing required by the Privacy Act and the normal
20 requirements of federal discovery. And that, in my view,
21 will likely require an in camera review of the very lengthy
22 FBI report and perhaps more voluminous supporting documents.
23 The FBI's ongoing review of that material may prove to be
24 helpful to me in being able to focus on the extent to which
25 that report and the investigative materials may reference

1 defendants in this case. So I am inclined to wait for them
2 to complete their, at least their initial review of these
3 materials before I call for an in camera review.

4 In the meantime, I'm going to suggest one thing
5 that defendants in particular can do to reduce the scope of
6 the burden on the FBI in this case, and that is determine
7 which of the named defendants worked at the Auburn facility
8 between 2001 and 2005 which is the time period the
9 investigation by the FBI looked at, so that we can limit the
10 number of names that the FBI and I will be trying to find in
11 the report and in the supporting materials.

12 And then the other thing I would note and I
13 don't -- you know, I'm not, again, I'm not being critical,
14 this is kind of an obscure issue, but I'm not sure that the
15 sort of generic protective order that was already entered in
16 this case, even though it's somewhat detailed, and the very
17 terse order that the plaintiffs have provided here would
18 really be what the FBI was looking for if I were inclined to
19 make a finding under the Privacy Act that some of this
20 information needs to be disclosed. And I know, I think the
21 plaintiffs cited the *Cepeda* case which has a much more
22 tailored and detailed Privacy Act protective order which may
23 be more what the FBI is looking for.

24 So that having been said, I will give each side a
25 chance to make any comments or seek any clarification of my

1 proposed course of action starting with the plaintiffs. And
2 again, please identify yourself when you're speaking.

3 MS. ROSENFELD: Thank you, your Honor, this is
4 Katie Rosenfeld for Mr. Raymond. I think just to take the
5 last thing you said first, the terse protective order that we
6 submitted was one that Mr. Spina actually shared with me as a
7 model that had been given to him by Ms. Ivashkiv. So I had
8 actually just literally cut and pasted from another
9 protective order that had been suggested by FBI-OGC. I'm
10 happy to submit a different one, I had thought that using the
11 one that the FBI had presented as an example from another
12 case would be helpful, but I'm happy to obviously do a more
13 detailed one as the court suggested.

14 THE COURT: Oh, okay, well, that's interesting, I
15 didn't know that and it certainly is reasonable to use the
16 model that the government provided to you. Okay.

17 MS. ROSENFELD: Yeah, I mean I agree with you, your
18 Honor, I thought it was a bit terse, but I thought it would
19 make sense to just use what they gave us but obviously we can
20 tailor it as the case may be.

21 You know, in terms of the burden on the FBI, you
22 know, we certainly don't mean to be dismissive of the burden.
23 I would note, your Honor, that when I -- the FBI, in response
24 to our FOIA request that was made last year, had already
25 pulled this 178-page report and engaged in a redaction

1 process, and so when I spoke with Ms. Ivashkiv in the Office
2 of General Counsel of the FBI and with Mr. Spina, I sent them
3 copies of that report and suggested that perhaps since
4 another part of their agency had already pulled this document
5 and started the redaction process, it would lower the burden
6 in terms of having to locate the document.

7 I also want to tell the court that we started on a
8 process through FOIA to obtain this and they provided it in,
9 the first 50 pages of the 178 pages in a very highly redacted
10 form, and it was actually at that point that we asked, that
11 we said, you don't need to continue, we don't want to take up
12 more of the resources of the agency with this extensive
13 redaction process which is not even producing a usable
14 document for us. And so we voluntarily withdrew our FOIA and
15 said you don't need to continue redaction beyond the 50 pages
16 you've already provided because we didn't want to burden them
17 with unnecessary work.

18 So I guess all that is to say, your Honor, there is
19 a document out there that the FBI has already pulled out of
20 its files and is known to it, and that was in one way we
21 hoped this would not be so burdensome on the agency. But I
22 understand your Honor's concerns on that front.

23 THE COURT: So let me -- before you move on, let me
24 just amplify on that a little bit. I mean, in addition, you
25 can imagine if there is a 170-page report, there's a ton of

1 underlying investigative materials, and I think the FBI has
2 construed your subpoena to include and require the review of
3 those underlying materials.

4 The other issue, and I'm, you know, I'm not
5 underestimating the difficulty of the very, very detailed
6 redactions that were made by the FBI but they basically
7 redacted everything which is a lot easier than trying to sort
8 out where in 178 pages of a report and a ton of investigative
9 materials one of, you know, half a dozen employees or former
10 employees of DOCCS might be referenced. So I appreciate what
11 you've said about the burden and I'm certainly, you know, not
12 prejudging that issue, but, you know, my sense from talking
13 with Tom Spina is a part of the reason that they are -- you
14 know, gave you the impression that they're happy to turn over
15 the whole thing unredacted as long as I put my name on the
16 order, you know, is because they're trying to avoid a very
17 tedious and time-consuming review and redaction process. But
18 that doesn't do me a lot of good.

19 MS. ROSENFELD: I see. So your Honor, just to, I
20 guess further working backwards to start with your initial
21 comment, you know, I certainly hope that the court doesn't
22 feel that we in any way have misrepresented what the FBI told
23 us. As you saw we just submitted to the court as Exhibit A
24 in our reply letter, the letter from the FBI to us stating
25 their position, and in that letter, the FBI-OGC did inform us

1 that they had conducted the *Touhy* analysis with regard to our
2 request and had found that we, we meaning plaintiff, had
3 satisfied *Touhy* in terms of establishing the relevance of the
4 documents to our case and then they note that the next step
5 would be whether we would obtain a Privacy Act order and
6 whether they would have additional privileges and objections
7 to assert.

8 THE COURT: Okay, let me interject there, and I've
9 read that letter and I can understand why you came to that
10 conclusion, and I certainly, as I say, the FBI and the
11 government would be happy to kind of pass the buck to me to
12 take the responsibility for making the decision as to, you
13 know, weighing relevancy and privacy, but I don't -- I don't
14 think that's their position now. But I'm certainly not
15 accusing you of misrepresenting their position because I
16 understand that that letter could be read the way you've
17 interpreted it.

18 MS. ROSENFELD: Right, and I also spoke with
19 Ms. Ivashkiv, your Honor, and specifically was, it sounds
20 like maybe their position has evolved and that your Honor has
21 a more up-to-date status on their position and so obviously
22 once the documents are produced to you for in camera review,
23 it sort of moots what their position is. But just to be
24 clear, the main document that we're seeking, that I spoke
25 with Ms. Ivashkiv about is the 178-page report, and I will

1 clarify this with both Ms. Ivashkiv and Mr. Spina in writing
2 after this call, we are not asking them to produce every
3 underlying investigative document that's set into that final
4 set of conclusions and I agree that that would be burdensome.
5 So I will clarify that with them.

6 You know, I do want to point out, your Honor, that
7 this issue of the timeframe, like I'm sure you'll deal with
8 this when you get to looking at the actual submission, but
9 you know, we've -- the attempt to cabin the timeframe of
10 discovery here I believe is very misguided because the very
11 allegation in our complaint is that the fact that
12 Mr. Mitchell was allowed to work there for so long despite
13 having been identified so long ago as someone with abusive or
14 violent propensities is a, perhaps supports punitive damages
15 and certainly deliberative indifference against the
16 superintendent for permitting this person to stay there for
17 30 years. So I don't think that something that is remote in
18 time here with respect to the question of whether the
19 individual, Mr. Mitchell, committed this particular assault,
20 we could disagree about that, but what we are saying that
21 it's important to and I think it really supports the further
22 back you go, is that it's relevant to the question of
23 supervisory liability of continuing to employ this known
24 predator who the FBI itself may have identified in this
25 investigation and not subjecting that person to additional

1 surveillance or monitoring or check-ins or whatever the case
2 may be.

3 THE COURT: Okay, let me, let me interject again
4 and I'm -- I don't mean to break your flow here but you
5 reminded me of something. One of the suggestions in the
6 defense letter was that, in both letters was some lack of
7 clarity as to when, what Superintendent Graham knew and when
8 he knew it with respect to the contents of the report and
9 perhaps the ongoing conduct of Mitchell and there was a
10 suggestion that you may be looking to postpone the Graham
11 deposition until you get whatever FBI documents I authorize
12 the release of. You know, one thing that I think argues
13 against that is the need to clarify the extent to which
14 Graham was involved in the investigation or the report or
15 aware of the investigation and the report. And obviously,
16 you know, you've got to make your decision as to when you
17 think it's best to do that deposition but that, you know,
18 it's not entirely clear that the report is necessarily -- was
19 necessarily communicated to Graham and that that would be as
20 relevant to his supervisory liability as would, for example,
21 a number of lawsuits that you've cited that came
22 subsequently, some are relatively recently against Mitchell
23 and others.

24 MS. ROSENFELD: Of course, and that's obviously
25 something we need to explore with him in that position and

1 have pointed out that this report was issued in March and he
2 started in October of that year. And you're right, your
3 Honor, it's possible that he never knew about it, never heard
4 of it, he didn't know who was interviewed and it has no
5 bearing. On the other hand, this large multi-agency law
6 enforcement investigation involving 50 officers at the
7 facility, one could also imagine that an incoming
8 superintendent would be briefed on it or would make it his
9 business to know about what had occurred so he could run the
10 facility going forward in a safe and humane way.

11 So I agree, your Honor, we don't know at this point
12 exactly how it cuts and that's something we'll have to
13 explore with Mr. Graham at his deposition. But this is
14 obviously discovery, this is not trial, we're -- you know,
15 we're not at the stage where we're talking about whether this
16 kind of evidence is going to be admissible at a trial, we're
17 simply talking about whether it's going to be produced in
18 discovery as part of these claims and I think given that
19 standard, these materials should be -- and the fact that we
20 later can argue about what the jury gets to hear about, I
21 think should be a separate inquiry than the presumptively
22 broad nature of discovery here, particularly when we've made
23 this kind of facial showing of relevance which frankly is
24 supported by what the defendants say in their letter which is
25 now we've learned that Mr. Mitchell does remember being

1 interviewed by the FBI, or by a New York State police
2 officer, I'm sorry, I don't want to misspeak. They mentioned
3 that he did recall that he had been interviewed by several
4 law enforcement members around this time. You know, they've
5 sort of put his -- they've cast his participation in a
6 certain way now in this letter to the court which of course
7 we have no ability to test without the underlying documents.

8 So, you know, I understand your Honor's going to be
9 doing an in camera submission and I don't want to belabor
10 these points, but this lawsuit really is about how DOCCS
11 allowed this person to continue to work at this facility, he
12 was sued in the aughts, he was sued in the tens, he was sued
13 in the teens, you know, this is somebody who should not have
14 been working there all these years and I think that the large
15 multi-agency law enforcement investigation being conducted
16 which includes the interviews of him and the extent to which
17 his coworkers and supervisors knew about that, going forward
18 is something that we should be permitted to explore in
19 discovery. And I guess I would respectfully ask, your Honor,
20 that to the extent that there is an in camera submission and
21 your Honor has -- you know, determines that there's
22 additional judgment calls or legal arguments, that we be
23 given the opportunity to make another submission if it would
24 be helpful to the court.

25 THE COURT: Okay, fair enough, and I, you know, I

1 certainly -- but the fact that I'm doing an in camera review
2 I think reflects the fact that I have not made a hard and
3 fast determination as to a timeframe, you know, that
4 inherently is no longer proportional if it's older than a
5 certain amount. But you know, and I am guessing here because
6 I did not get into any detail with Mr. Spina and I'm not sure
7 he had the details, but my sense is while Mr. Mitchell may be
8 discussed or referenced in this report, I do not have the
9 sense that he was identified as one of the, you know, 10
10 recurring mal-actors or mal-feasors or whatever that was
11 driving a lot of the problem. So you know, the extent of his
12 participation is going to be important and, you know, as I
13 suggested earlier, other information about the extent to
14 which Graham was really in the loop on this are going to be
15 important in my decision as to proportionality. And I
16 certainly am happy once I get a better handle on things to
17 give each side a further opportunity to be heard.

18 MS. ROSENFELD: Your Honor, I don't think that the
19 document is going to reflect the extent to which Mr. Graham
20 was in the loop because whether he -- his superintendent role
21 did start after that. I think that's something that's going
22 to have to be determined in his deposition. And in
23 discussion about whether he was given the report, told about
24 it, what kind of system he implemented once he learns that a
25 number of officers have been implicated, all of those

1 questions I think are going to be in his deposition, but I
2 think without the benefit of being able to see the report and
3 understand what was going on at the facility, because it's
4 not just about defendant Mitchell, your Honor, it's about a
5 culture that allowed this to continue, you know, for many,
6 many years, and whether Mr. Mitchell was the ringleader in
7 2005 or at that point he was a follower, he certainly became
8 a ringleader at the facility later. And so all of this I
9 think is fair game for us to conduct discovery about.

10 THE COURT: Okay. I'll start with Mr. Mackey or
11 whoever on your side, you want to say anything?

12 MR. MACKEY: Thanks, your Honor, yes, it is Patrick
13 Mackey for the defendants. Your Honor, I mean there was
14 several issues I wanted to get across with this particular
15 motion and maybe I won't get into it just because of the way
16 you've informed us that there's going to be an in camera
17 review of the documents. I was going to get into how this is
18 a fishing expedition and, you know, irrelevance of some of
19 this information but I think I'll pare back my arguments just
20 so I don't belabor the point.

21 One thing your Honor did ask is about who was
22 working at the facility during the investigation. I think
23 the investigation was 2001 to 2005. So of the nine
24 defendants we represent, three were working at that time.
25 One was Troy Mitchell who we've already acknowledged was --

1 started work during that period, another was Thomas Phillips,
2 and this is information that was provided for me by DOCCS,
3 Thomas Phillips looks like he started at Auburn in October of
4 1990 and would have been present at the time of the
5 investigation, and the other defendants, Thomas Giancola
6 looks like he started at Auburn in September of '95 and it
7 appears he was also at Auburn during the investigation. So
8 if there's an interest in trying to narrow it down as to who
9 was actually there at that time, at Auburn, it's Mitchell,
10 Thomas Phillips, and Thomas Giancola.

11 THE COURT: Okay, that's helpful, thank you.

12 MR. MACKEY: You're welcome. So like I said, I'll
13 pare back my arguments. I think the one thing I really
14 wanted to hit on was the issue with the Privacy Act, and I
15 know your Honor mentioned that if there are names, for
16 instance, Mr. Mitchell is named in the report, that that may
17 make the report more relevant. And I guess that kinda -- I
18 kinda disagree, I mean obviously a lot depends on how he's
19 mentioned. If he's just mentioned in passing, I think that
20 definitely lends towards the report being somewhat irrelevant
21 to him and in general irrelevant to this case. But there's
22 also the argument that if he's, you know, named more than in
23 passing, if he's named as possibly a target of the
24 investigation like you mentioned there was 10 individuals who
25 were -- seemed to be more targeted for the investigation, I

1 do think the Privacy Act does kind of step in when we're
2 dealing with how we're balancing the burdens. As your Honor
3 mentioned earlier, there's a balancing of need versus harm
4 and in this particular light I mentioned, or I cited in the
5 letter the Supreme Court case of *Douglas Oil* and that case is
6 important because it makes the mention that if you're part of
7 an investigation, and in that case there was a grand jury
8 that did not -- and the individuals named in the grand jury
9 were eventually exonerated, that they should be considered as
10 individuals or information related to those individuals
11 should not be disclosed so they're not held up to public
12 ridicule. And I mention this in the letter and I just
13 thought it would be better to mention it again, that it
14 appears that there was a grand jury convened related to this
15 investigation, but there were no indictments. Mr. Mitchell,
16 and from what we gathered, no one else was indicted, and he
17 was never disciplined for it, he was never criminally charged
18 for it. So even if he's named in this report more than just
19 in passing, I think the Privacy Act kind of lends towards the
20 idea that he was never charged with anything or disciplined
21 for anything and his name shouldn't be released on a public
22 document. Not a public document, a document related to law
23 enforcement, that may result in public ridicule to him and
24 possibly some others if these other individuals are also
25 named in the report. So --

1 THE COURT: Right, and let me --

2 MR. MACKEY: Judge --

3 THE COURT: -- just as I've done this to your
4 opponent, so I'll do this to you, I think the -- I think the
5 grand jury context is significantly different than this
6 context but it is a fair consideration and I appreciate that.
7 You could argue, if I were channeling Ms. Rosenfeld here,
8 that the absence of discipline at Auburn may reflect the
9 culture of allowing this violent conduct and that might make
10 it more relevant so it's kind of a -- you know, it's kind of
11 a complex issue, but go ahead.

12 MR. MACKEY: Right. And I kind of, last, what I
13 was also going to mention and I think you mentioned this
14 already, is that with respect to Mr. Graham who was the
15 superintendent, he came in in October of 2005 where this
16 investigation was done in March of 2005, so obviously he
17 wasn't there for the investigation, I'd be surprised if
18 there's any possible way his name would show up in the
19 report, he wasn't there yet, but we're also dealing with a
20 report that was kept under wraps, and you know, when asked,
21 he said he'd never seen the report, and he's never been told
22 who was in the report. So I understand what Ms. Rosenfeld
23 said, she might want to dig into that with depositions and I
24 guess that's fine, but I think that should also, if they're
25 looking towards supervisory liability, you know, I find it

1 difficult to say how someone who's never been shown the
2 report or provided information to the report could then be
3 said to be, what was the term they used, deliberately
4 indifferent to the report.

5 And my final thought, your Honor, is that, and
6 maybe this goes more towards relevance, is that we're dealing
7 with a document, and when I say document I mean a report,
8 that was put together in March of 2005, and that's 11 years
9 before the alleged incident of September 2016. So obviously
10 the report has no direct relation to the events of
11 September 2016. At best, and I think this is a stretch, have
12 some of type of tangential relationship but it seems to be a
13 big leap to claim that there's some relevance into a report
14 that was prepared in 2005 related to allegations of excessive
15 force in 2016. So I think that's important when we're --
16 when your Honor's looking at this report and making the -- or
17 balancing the need versus harm, is that we're not talking
18 about a report that is directly related or reports on the
19 events of September 2016. We're talking about a document
20 that has absolutely no connection to what happened or what
21 allegedly happened in September of 2016, and the fact that
22 they're so far apart, 11 years and more because the
23 investigation started in 2001, and the fact that they are not
24 directly related means we're really looking for some
25 information, it's really lending towards a speculative

1 subpoena, I'll use the word fishing expedition, but it also
2 lends towards irrelevance. How relevant could this document
3 really be in this case when we're talking about alleged use
4 of force in September of 2016, and we're talking about a
5 report that didn't lead to any indictments that was released
6 in 2005? It seems to be a stretch to me.

7 THE COURT: Okay, fair enough. Ms. Buth or
8 Ms. Baker, anything you want to say on the subject?

9 MS. PERRI ROBERTS: No, your Honor.

10 MS. MEYERS BUTH: No, thanks, Judge.

11 THE COURT: Okay. Ms. Rosenfeld?

12 MS. ROSENFELD: Your Honor, yes, I just wanted to
13 say one thing which is that, you know, I think that
14 defendants' counsel appears to be privy to some information
15 via DOCCS that we are not privy to. So for example, the
16 information that this did go to a grand jury, that there was
17 no indictment, that certain people were or were not
18 interviewed, you know, all of that may or may not be the
19 case. I take counsel at his word that it went to grand jury
20 and there was no indictment but we don't have access to any
21 of that information. And I think that the reason that it's
22 important to have the documents produced so that everybody is
23 fairly on the same page in terms of the value and
24 significance of this investigation to the case and deciding,
25 you know, what role it may play at trial. So I just, you

1 know, this issue about it going to a grand jury but not --
2 there not being an indictment, I think there's a lot of
3 reasons that that may happen. I'm not aware of anything to
4 do with the grand jury and, again, DOCCS has produced no
5 discovery about this and has refused to produce it to us,
6 although it appears they're sharing information informally
7 with defendants' counsel that they then bring forward, you
8 know, as helpful, right? So they took the position, DOCCS
9 took the position it would not provide any documents to us
10 about this investigation, but yet has shared information as
11 it deems helpful with Mr. Mackey. So I think there's a
12 disparity in access to information in order to evaluate the
13 situation which is why we issued this nonparty subpoena, to
14 try to rectify that.

15 THE COURT: Yeah, the only thing I will say, and
16 Mr. Mackey, you can weigh in on this or not if you wish, but
17 I mean, he also has three clients who were there at the time
18 so that may be the source of his information as opposed to
19 DOCCS, but I don't know.

20 MR. MACKEY: Your Honor --

21 THE COURT: Go ahead.

22 MR. MACKEY: You're correct, this is nothing that
23 we got from DOCCS. We've been talking with our clients
24 regarding this, and I mean DOCCS, it's not a refusal to turn
25 over information, this is an FBI investigation, DOCCS

1 wouldn't have this information so --

2 MS. ROSENFELD: Well, respectfully it was a joint
3 DOCCS New York State --

4 MR. MACKEY: If I can finish. If I can finish.
5 But your Honor, yes, I mean the information about not being
6 charged, not being disciplined, understanding that there was
7 a grand jury convened and no indictment, that's information
8 we're getting directly from our clients, not from DOCCS.

9 THE COURT: Okay. So I am going to communicate
10 further with Mr. Spina, I'm -- I would appreciate,
11 Ms. Rosenfeld, if you followed through with your stated
12 intention to let them know that you're focusing on the report
13 and don't necessarily need them to dig up all the supporting
14 investigative materials which might short circuit their
15 investigation or their, you know, their document review. I
16 will share, Mr. Mackey, your information about the three
17 defendants who were present at the facility at the time, and
18 then, you know, basically see, try to arrange to get the
19 report submitted to me for in camera review as soon as they,
20 you know, basically have been able to do their initial review
21 and can share with me any shortcuts to try to figure out the
22 extent to which the defendants are implicated here. Okay.

23 So the next issue, changing gears now, is the
24 deposition of the plaintiff. So I guess I have a couple of
25 questions based on your two letter briefs, and I -- by the

1 way, I apologize for not getting back to you sooner,
2 Mr. Mackey, your team with your desire to file a response but
3 I had a wedding anniversary with my wife and was not frankly
4 responding to emergency requests. So you filed your response
5 anyway so it worked out. But the suggestion, Ms. Rosenfeld,
6 was that you were prepared to conduct your part of the
7 deposition of your client from the city remotely even if he
8 was going to appear in person in Buffalo, was that the
9 original plan?

10 MS. ROSENFELD: That's not the plan, your Honor.
11 The original plan was that we noticed the deposition -- I'm
12 sorry. That they asked to conduct the deposition in Buffalo
13 and I was going to, or my colleague or both of us were going
14 to travel to Buffalo to be there in person at their office
15 with our client.

16 THE COURT: Okay. And I'm taking --

17 MS. ROSENFELD: And then we would -- I'm sorry,
18 your Honor.

19 THE COURT: Go ahead.

20 MS. ROSENFELD: I was just going to say, and then
21 we were going to return a second time on November 20th to
22 take Mr. Mitchell's deposition also in person at their office
23 before --

24 THE COURT: Okay. And I'm presuming that your
25 client lives in the Buffalo area?

1 MS. ROSENFELD: He lives -- he lives, I'm aware
2 exactly, yes, he lives close, relatively close to there, I'm
3 not sure if it's Buffalo proper but somewhere nearby.

4 MS. LERNER FREEMAN: I believe it is in the suburbs
5 of Buffalo and we can provide the court with specific
6 information if that's needed. This is Emma Freeman.

7 THE COURT: Okay. And you alluded to some medical
8 conditions the plaintiff has that might make him more
9 vulnerable to the COVID situation, and I know that's a
10 sensitive subject and we can figure out some other way to
11 communicate that to me if you don't want to do it on the
12 record. But I think that would be relevant to my
13 determination as to, you know, whether it's appropriate and
14 reasonable for him to not want to go through with the
15 in-person deposition.

16 MS. ROSENFELD: Well, your Honor, the request to
17 not go through with the in-person deposition stems largely
18 from counsel. So I don't want to place Mr. Raymond's medical
19 condition at the center of this. I think it's an additional
20 concern, as is the health of anybody at these depositions.
21 You know, he has ongoing neurological problems, having
22 surgery on November 17th, you know, he has medical problems
23 but I -- this is, you know, the issue that I think we really
24 are focused on is the risks involved in all of us being
25 together in the room, not just to Mr. Raymond but to my

1 opposing counsel, to the court reporter, to -- and the risks
2 associated with travel, hotel stays and all of that. So I
3 don't want to overstate or sort of inflate the issue about
4 Mr. Raymond's medical condition because I think really the
5 issue is that it's not wise at this point for anybody to be
6 in a confined space in a group of eight people at this
7 juncture for 10 hours.

8 THE COURT: Okay. And do you have a sense of
9 whether your client would have to take public transportation
10 to the deposition as opposed to just drive downtown?

11 MS. ROSENFELD: I don't know, your Honor. But your
12 Honor, I have to say that the idea that we would be forced to
13 remotely defend our client's deposition is a real -- imposes
14 a huge difficulty and if your Honor orders that, then I'm
15 going to have to end up going to Buffalo anyway because I
16 would never allow my client to be alone deposed with the
17 other counsel present and not have me present.

18 THE COURT: Okay, that's a fair point. All right.
19 So the defense arrangements, you're proposing that the
20 plaintiff come in and that the New York lawyers either need
21 to come out there or they need to defend the deposition
22 remotely. How would that work? You suggested that you would
23 provide them some confidential way to communicate during the
24 deposition; would there be just the witness on camera, would
25 the questioning lawyer be on camera from Buffalo, what are

1 you proposing here?

2 MS. PERRI ROBERTS: Your Honor, this is Diane Perri
3 Roberts, I'll take the lead on our end on this subject. We
4 offered a couple different options and one option would be,
5 although I now understand they don't want to defend -- I'll
6 use the word defend their client's deposition without being
7 physically present, but if they had their client come into
8 our office and they were remote in the deposition, we could
9 arrange a separate conference room with a phone in the event
10 their client needed to, in a permissible manner, communicate
11 with them during the course of the deposition if there was a
12 question about privilege or anything like that, we would have
13 a separate room that their client could go to to make that
14 telephone call to talk to the attorneys, you know, outside of
15 anything that our office or the court reporter would even be
16 able to hear. So that was the way we thought that could be
17 handled.

18 THE COURT: All right. And would the questioning
19 lawyer also be on a separate camera or would it just be the
20 witness that would be visible to somebody who was appearing
21 remotely?

22 MS. PERRI ROBERTS: I believe it would be the
23 witness but we could certainly, if it provided a greater
24 level of comfort, look into having a camera on the
25 questioning attorney, too. I know that's not usually the way

1 it's done, but we could, I'm sure, make that type of an
2 arrangement.

3 THE COURT: Okay. All right. Well, so I think --
4 I mean, I live in upstate New York, as do the defense
5 attorneys, and we may be a little less concerned about the
6 COVID situation in part because we got through it much more
7 gently than our colleagues in the New York City area did.
8 I've -- my wife is particularly paranoid about this issue so
9 it's something we talk about a lot and we, you know, look
10 into a lot and the Buffalo area is still in relatively good
11 shape in terms of controlling the virus, but that having been
12 said, I think things are going to continue in the fall and
13 winter to get worse. I would not want to have to travel by
14 plane to do my job. You know, I'm doing some proceedings in
15 person in Syracuse but, for example, I'm having a -- what we
16 call an exhaustion hearing which is kind of like a bench
17 trial where I'm going to have, you know, a bunch of lawyers
18 and witnesses in an Albany courtroom socially distanced and
19 I'm going to preside from Syracuse, not because I necessarily
20 would be concerned about being in that particular courtroom,
21 but I don't particularly want to like spend a night in a
22 hotel in Albany. So I am not inclined to force lawyers to
23 proceed with an out-of-town in-person deposition. And I
24 would, you know, I would note that plaintiff's counsel have
25 from the start not tried to gain any tactical advantage,

1 they're doing all the defense depositions remotely which,
2 particularly for defendant Mitchell I think is, you know, is
3 I'm sure something that the plaintiff's lawyer would prefer
4 not to do. So the question then becomes do we delay things
5 for six months or four months or some fairly substantial
6 amount of time to see if things improve and we can get back
7 to a situation where people are more comfortable traveling
8 and doing in-person depositions, or do we just take our lumps
9 with the current COVID situation and move forward with these
10 remote depositions with the understanding that everybody is
11 going to be at a little bit of a disadvantage. You know, I
12 know there was a concern about documents, you know, being
13 difficult to show on the screen and that sort of thing and I
14 know that a lawyer doesn't necessarily want to telegraph the
15 nature of their questioning by providing all the documents in
16 advance, but, you know, as I say, I've conducted proceedings
17 where the documents have been marked in advance so everybody
18 can refer to a hard copy if they need to look at a hard copy.
19 And again, I understand that's different than what we're used
20 to and not necessarily ideal, but given the fact that both
21 sides are going to operate with the same disadvantages, I
22 guess I would vote for moving forward with the current
23 schedule and doing all the depositions remotely. But I will
24 hear from the defense in terms of the option of delay, if you
25 want to go that way.

1 MS. PERRI ROBERTS: Yes, your Honor. Again, it's
2 Diane Perri Roberts. One thing I do want to bring up and
3 this is an opportune time to do it, is that we somewhat
4 recently, because of some document issues, were contacted by
5 assistant state -- Assistant Attorney General for the state
6 Bonnie Levy who is defending an action in the Court of Claims
7 that Mr. Raymond has commenced against, I believe it's DOCCS,
8 and we also just recently got from Assistant Attorney General
9 Levy a scheduling order that has recently been entered in
10 that Court of Claims action in which plaintiff's counsel
11 apparently represented to the judge, I believe it's Diane
12 Fitzgerald, Judge Fitzgerald in the Court of Claims --

13 MS. ROSENFELD: Fitzpatrick.

14 MS. PERRI ROBERTS: -- Fitzpatrick, that the intent
15 was to move forward with one set of depositions across the
16 Court of Claims action and the federal, this federal court
17 action such that each individual defendant in a federal court
18 action who also obviously is being brought up in the Court of
19 Claims at least by name and going to be deposed, that they
20 would only be deposed one time. So we also now have an
21 issue, and again, this has just been made aware to us very
22 recently, that there's depositions scheduled and they've done
23 a discovery calendar in that matter, a scheduling order that
24 those depositions are to be done no later than, I believe it
25 is July of 2021, so I would expect those would be being

1 scheduled sometime in the spring. And it begs the question
2 of why can't we just do one set of depositions in the spring
3 and get these done at one time since, again, plaintiff's
4 counsel's already represented to the Court of Claims that the
5 intention is to do one set of depositions to cover the Court
6 of Claims action and the federal court action.

7 THE COURT: Ms. Cowan, Bonnie Levy is an AAG?

8 MS. COWAN: Bonnie Levy is, yes.

9 THE COURT: Wow, okay, I didn't know that.

10 MS. COWAN: About 10 years.

11 THE COURT: Oh, okay. So Ms. Rosenfeld, what do
12 you think about the delay option?

13 MS. ROSENFELD: Your Honor, we filed this case in
14 2018. Ms. Cowan, through no fault of her own, had to
15 withdraw, counsel came in, we had extensive delay while they
16 got up to speed which we accommodated as professional counsel
17 do. The case is getting old. We agreed on these depositions
18 in the fall. I would note that the Court of Claims action
19 has been pending for many -- if not years, there's no -- the
20 fact that it's a surprise to defendants' counsel, I don't
21 know why it is. I mean, it's been out there, it's making its
22 way slowly. We had spoke with Ms. Levy about how it would be
23 great if everybody could do depositions together but she is
24 not ready to do depositions and since has said that she would
25 have to follow. So this is a federal court action, it's

1 pending, we would like to just keep the schedule that we all
2 have worked all fall to put together. The only difference
3 now is we do it remote. And I completely agree with your
4 Honor, we're extremely disappointed not to take our own
5 depositions in person and to be with our client in person for
6 his deposition. It's not ideal by any stretch, but we've all
7 set aside the days, we've all prepared, I don't understand
8 why we would adjourn an entire schedule of depositions for
9 the month of November and early December. And unfortunately
10 I'm not super optimistic that things will be different in
11 four months. And I don't think it's in our client's interest
12 to have further delay in proceeding with this case.

13 THE COURT: All right. Did -- the Court of Claims
14 action I'm assuming is just like personal injury claims
15 against the state?

16 MS. ROSENFELD: Correct.

17 THE COURT: Relating to the same incident?

18 MS. ROSENFELD: Correct.

19 THE COURT: And you represent the plaintiff in that
20 as well?

21 MS. ROSENFELD: Correct.

22 THE COURT: Okay. And Ms. Levy is not ready to do
23 joint depositions even if they're remote?

24 MS. ROSENFELD: My understanding when we talked to
25 Ms. Levy last was that she was not ready to start

1 depositions, that she was reviewing documents, you know, I
2 feel a little uncomfortable speaking for her although we've
3 worked very well together, but yes, that was my understanding
4 because we notified her we were in the process of scheduling
5 these and I believe she said you'll just sort of have to go
6 ahead without me at this point because I'm not -- I can't
7 start now. And we --

8 THE COURT: And you --

9 MS. ROSENFELD: I'm sorry, your Honor, I just
10 wanted to say one more thing. And because -- whatever,
11 that's sufficient, your Honor, yes.

12 THE COURT: Ms. Cowan, I'm assuming you don't have
13 any insights as to Ms. Levy's case?

14 MS. COWAN: I don't, your Honor, I can certainly
15 speak to her. It would surprise me that she would be willing
16 to have depositions go forward without her being involved. I
17 know that typically it's our practice in this office if
18 there's a federal matter and a state court matter, that we do
19 joint depositions so that our clients aren't being deposed
20 twice. But I don't know what communication she had with
21 plaintiff's counsel, I have to admit. So to me, if it were
22 me, I would want just one set of depositions to be completed.
23 And I would be very shocked that she doesn't want to be
24 present at least remotely for the depositions.

25 THE COURT: Okay.

1 MR. MACKEY: Your Honor, this is Patrick Mackey.
2 The brief communications I had with Ms. Levy was that she was
3 expecting that she'd be ready after the new year. To start
4 doing depositions.

5 MS. ROSENFELD: Your Honor, this is Ms. Rosenfeld,
6 I really object to this kind of 11th hour attempt to delay
7 our depositions based on a case that has been pending in the
8 Court of Claims for the entire time that we've made this
9 schedule. Nothing has been hidden from defendants,
10 everything has been out in the open, we should be working
11 with Ms. Cowan. Everybody knew that there was a Court of
12 Claims action and the fact that defendants, for whatever
13 reason, do not want to proceed on the schedule that we all
14 agreed to and are now raising at this very last minute that
15 somehow there should have been overlap between these
16 depositions, I don't think it's appropriate. We set a
17 schedule, we agreed on it, we've already had years of delay
18 because of the conflicts and late entries and we want to
19 produce our client and we'll produce him twice if we have to.
20 We often do that, unfortunately, and we do it for New York
21 State for the Notice of Claim process, 50-h Hearing, and then
22 for the federal case. So we are ready to produce our client
23 on November 5th and we would like to proceed with his
24 deposition and we do not think there's any reason for delay.
25 And Ms. Levy, I have no idea when she will be ready but I

1 don't think the federal court action can fairly be held
2 captive to her schedule.

3 THE COURT: And are you willing to go forward with
4 the -- your depositions of Mitchell and Graham on the current
5 schedule or are you going to be looking to postpone those
6 because of the delay in finding out what you're going to see
7 in terms of the FBI documents?

8 MS. ROSENFELD: I think we would want to postpone
9 those because of the fact that there is this pending issue
10 with the additional discovery.

11 MS. PERRI ROBERTS: Your Honor, this is Diane Perri
12 Roberts, if I could be heard. In terms of, in terms of what
13 we knew, number one, we are not privy to everything that's
14 going on in the Court of Claims action but we just very
15 recently had a letter shared with us, it's dated
16 September 24th from Judge Fitzpatrick's chambers, and in that
17 letter, it states that depositions have been noticed but not
18 scheduled, and I'm just tabbing down to read it to you, the
19 depositions have been noticed but specific witnesses have not
20 all been identified. The intention is to conduct joint
21 depositions with the federal court action to the extent
22 possible given the timing of the two cases. Claimant plans
23 to depose about 12 witnesses in the federal court action,
24 defendant anticipates fewer than 10 witnesses for depositions
25 in this case. That's from paragraph four of that letter.

1 Again, that letter from the court has a date on it of
2 September 24th. It issued after the deposition notices came
3 out in this case from plaintiff's counsel on September 15th.
4 Those were sent to us and they were sent to us with a series
5 of dates that we worked very hard to contact our clients and
6 to set things up, but again, we made it very plain that we
7 wanted to depose the plaintiff first, in person, and that has
8 been agreed upon.

9 Now, the thing is, we're talking not only on our
10 end we have nine people who are going to have to sit through
11 a deposition, some of these individuals are retired, they're
12 going to have to sit through a deposition in the federal
13 case, and then sit through a deposition in the Court of
14 Claims case when there's already been a representation that
15 there would be, to the extent possible, joint depositions.
16 That's one point.

17 The other point is in terms of expenditures and
18 things moving forward, you know, we have some people, again,
19 who are retired and may have to -- I don't know if they're
20 going to do these remote in the Court of Claims action,
21 whatever, but I think from the state's perspective, it's
22 definitely -- from everyone's perspective, it's definitely
23 more effective timewise, cost wise to do a deposition one
24 time with an individual on the same set of facts and the same
25 circumstances. You know, this isn't a long-standing case in

1 terms of something that was filed in 2018 and it really, this
2 is not us bringing this up at the 11th hour, we're not
3 counsel in the Court of Claims action. But again, just very
4 recently became aware that all of this was going on with
5 depositions and discovery in that case because we were asked
6 to get involved with some of the document production and to
7 help move things along in that Court of Claims action on
8 documents and that's how we became aware of this
9 representation, this deposition.

10 The other thing is, minutes after I submitted my
11 response yesterday, we were copied on an e-mail that went to
12 Ms. Cowan who can mention this but there's also now,
13 plaintiff's counsel has also noticed nine nonparty
14 depositions all to take place immediately following these and
15 across these and into these dates starting November 30th. So
16 we're looking at right now like something like 19 depositions
17 taking place between November 5th and December 9th I believe
18 was the last date I saw. So I don't know how anybody can
19 keep up that type of a calendar and I don't even know who's
20 going to be available on what days with these nonparty
21 subpoenas that are apparently going to be going out.

22 THE COURT: And are these, what, other inmates who
23 were victims, alleged victims of other incidents or --

24 MS. ROSENFELD: No, your Honor, these --

25 THE COURT: -- this incident? Go ahead.

1 MS. ROSENFELD: These are nonparty witness -- five
2 of them are nonparty, are DOCCS employees that were
3 identified by defendants in their initial Rule 26 disclosures
4 and we don't know what those individuals are going to say at
5 trial, and two of them are nurses, one of them is the
6 investigator on the OSI incident, and the fourth person who
7 is not already identified who wasn't proposed by defendants
8 as a witness is the director of the Bureau of Labor
9 Relations.

10 But your Honor, the Court of Claims, we brought the
11 Court -- the Court of Claims action has been moving
12 relatively slowly, and we introduced Ms. Levy to defense
13 counsel, they omitted that but it was I who e-mailed all of
14 the defendants' counsel together to suggest that there could
15 be cooperation in terms of sharing Bates-stamped documents
16 that have produced in one action in another to try to create
17 an efficiency in that way. Ms. Levy, we all hoped, we all
18 had talked about joint depositions and Ms. Levy said, I'm not
19 ready, you'll have to go ahead without me. So the idea that
20 we are now wanting to change the schedule is just, I think
21 it's very out of the blue. We never talked to Ms. Levy about
22 it, she never asked us to adjourn the deposition, all of this
23 is coming from defendants' counsel today.

24 But what I would say, your Honor, is that we, we
25 have a conferral scheduled with Mr. Mackey tomorrow at

1 10 a.m. on some other discovery disputes. I think once those
2 disputes are either resolved or not, we had planned to write
3 a single letter to the court about seeking leave to exceed
4 the 10 deposition and then putting any issues that come up in
5 the conferral that are not resolved before the court. We're
6 trying to get discovery done on the schedule that the court
7 set. There's been a lot of delays in producing documents by
8 defendants that your Honor will recall, every deadline that
9 your Honor has set for document production, defendants have
10 requested at least twice to extend and for more time. We
11 received most of the documents in this case in September, we
12 have made enormous efforts to work through them all and to
13 digest them and be ready to take depositions on the schedule
14 that your Honor set. So if the criticism is that we are
15 working extremely hard after extensive delays on their end to
16 get the case done in the time your Honor set, yes, that's
17 what we're doing.

18 THE COURT: Okay. So right now, you have a
19 schedule for the plaintiff and all the named defendants in
20 the next month?

21 MS. ROSENFELD: Correct, your Honor.

22 THE COURT: And so Ms. Rosenfeld, if -- I guess you
23 sort of had me until you started to say there were two
24 depositions you wanted to adjourn, which then leads me to be
25 concerned that I'm giving you a tactical advantage here as a

1 result of, you know, your reticence to travel for a
2 deposition. So I think what I'm going to say basically is
3 that I'm going to direct the parties to continue with the
4 scheduled depositions, all of which will be conducted
5 remotely, and to the extent, Ms. Rosenfeld, you feel like you
6 have materials from the FBI investigation that you get
7 eventually that you need to follow up on, you may need to do
8 that in connection with the depositions in connection with
9 the Court of Claims, and I think the parties should agree and
10 I don't know if I can compel this or not but, you know,
11 basically the parties, even if, even if there are overlapping
12 depositions, the parties should agree that the depositions of
13 these witnesses will be usable in both cases and Ms. Levy,
14 you know, may want to at least sit in or listen in on the
15 depositions that are going to go forward in November and not
16 have to redepose, redepose everybody or -- you know, so I
17 guess what I'm saying, Ms. Rosenfeld, is, you know, from your
18 perspective, this is your one shot at the depositions of
19 these defendants with, you know, with the possible exception
20 that if the -- if you get something earth shattering from the
21 FBI documents, there may be another opportunity to depose the
22 defendants in connection with the Court of Claims case. Now
23 I don't know, I don't know if this requires some, you know,
24 further coordination with Ms. Levy, but you know, I guess
25 what I'm saying is, there would be a presumption against you

1 getting another bite at the apple in terms of deposing the
2 defendants in connection with the Court of Claims case.

3 MS. ROSENFELD: I agree, your Honor, I think we
4 should all agree to use the depositions that we take in this
5 case again for the Court of Claims action except to the
6 extent that there's some extremely significant material that
7 either side wants another hour to question the witness on.
8 So I --

9 THE COURT: I think, I don't think you can deprive
10 Ms. Levy of another bite at your client in the Court of
11 Claims case.

12 MS. ROSENFELD: No, but why would she -- why would
13 we have to produce our client twice but not them?

14 THE COURT: Well, because you are aware of your
15 interest in both sets of litigation and can cover those both
16 during your depositions, whereas she is not prepared and
17 ready to depose your client yet in connection with the Court
18 of Claims case.

19 MS. ROSENFELD: That makes sense, I understand,
20 okay, that's fine. I mean, I think we hopefully can use most
21 of what, whatever the defendants' testimony is in this case
22 for the Court of Claims case. I just want to make sure I
23 understand your Honor's direction with regard to Mr. Graham
24 and Mr. Mitchell. We'll proceed on the dates that we
25 noticed, and your Honor said if there's some earth-shattering

1 document in the FBI, that might be a basis to, and then I
2 just wasn't sure what that might mean.

3 THE COURT: Yeah, I'm not sure I thought that
4 through either. So let me say this. You've got, you know,
5 you've got a lot of -- I think you should cover with
6 defendant Graham what he knew or didn't know or learned or
7 didn't learn about the FBI investigation which I think you
8 can do without necessarily being privy to all the details and
9 with Mr. Mitchell you can certainly explore whatever
10 involvement he had in that investigation and any conduct of
11 his that was under investigation, and if it turns out there
12 is something in the FBI documents that I let you have that
13 shows that their testimony about what they knew or what they
14 were investigated for is wrong or not true, then I would
15 consider reopening those depositions.

16 MS. ROSENFELD: Understood, your Honor.

17 THE COURT: All right. Mr. Mackey, do you need to
18 say anything or clarify what my ruling is here? I'm -- you
19 know, you guys are giving me lots of things to do on the fly
20 here which is always a little risky, but I'm trying to, you
21 know, keep things moving here.

22 MR. MACKEY: Your Honor, I guess my understanding
23 is, and correct me if I'm wrong, is that the depositions to
24 be done of our nine clients, our nine defendants, will be
25 just the one deposition, that there won't be a second

1 deposition of them in the Court of Claims case, is that my --
2 is that understanding correct?

3 THE COURT: I'm assuming, and you know, I'm
4 assuming that Ms. Levy is not going to redepose the clients
5 in the Court of Claims cases and so yes, I think that's true
6 with the caveat that I just stated which is, if in
7 questioning Graham and Mitchell in particular but maybe also
8 the other two witnesses who were there during the timeframe,
9 Phillips and Giancola, there is, you know, some huge
10 discrepancy between what they say about the investigation
11 which I recognize may be a dim memory for them at this point,
12 I'm not ruling out allowing Ms. Rosenfeld to briefly reopen
13 those depositions to explore that. But, you know, I think
14 that -- I think that's fairly remote. But I am not, I am not
15 precluding Ms. Levy from redeposing the plaintiff, but
16 basically I would expect that the defense attorneys would
17 cover their business with the plaintiff in this deposition
18 and wouldn't expect that they would be getting a second bite
19 at the apple when Ms. Levy -- if Ms. Levy decides to depose
20 the plaintiff.

21 MR. MACKEY: Would that allow then Ms. Levy to
22 participate in the depositions that are coming up next month,
23 the nine defendant depositions?

24 THE COURT: Absolutely, and if she is to say, you
25 know, I want to sit in on the plaintiff's deposition but I'm

1 going to reserve my right to depose him in my action later,
2 then I'm going to allow that.

3 MR. MACKEY: Okay. I guess that covers the -- I
4 mean obviously I can't speak for Ms. Levy, but my guess is
5 that she'd want to participate in the one deposition that's
6 done for each defendant, and I guess that begs the question
7 if it works with her calendar or not, I don't know that.

8 MS. ROSENFELD: She never said that she wanted to
9 when we've talked with her about the fact that these
10 depositions are occurring.

11 THE COURT: Okay. Well, she -- Ms. Cowan, can I
12 ask you to communicate with Ms. Levy and just have her
13 understand that she has that option if she wishes?

14 MS. COWAN: Sure, absolutely.

15 THE COURT: And the plaintiff's deposition is what
16 day?

17 MS. ROSENFELD: It's November 5th, your Honor.

18 THE COURT: Okay.

19 MS. ROSENFELD: Your Honor, is this -- is your
20 order something that you will communicate with Judge
21 Fitzpatrick about? Or should we -- I mean, the fact that the
22 deposition, the order that you just gave with respect to the
23 conduct of depositions in the court against Judge
24 Fitzpatrick's case, should we communicate that to her?

25 THE COURT: Well, I know Judge Fitzpatrick but I

1 don't know her well enough to -- you know, I coordinate with
2 other federal judges in cases where they're related cases or
3 overlapping cases, I'm not sure that I'm going -- I would
4 feel comfortable doing that here, you know, what -- and I, if
5 you're having a conference tomorrow, I think the lawyers need
6 to make sure they're on the same page, that my suggestion is
7 that you proceed with the defense depositions to, you know,
8 cover any issues you have with them and proceed with the
9 plaintiff to cover any issues that you have with the
10 plaintiff and that those would be available in the Court of
11 Claims case subject to Ms. Levy wanting to depose the
12 plaintiff further or even the defendants if she wanted to,
13 but I can't imagine she would want to do that. Then I don't
14 know that it has much impact on Judge Fitzpatrick other than
15 the fact that she may be able to avoid having the defense
16 depositions on her tab.

17 MS. PERRI ROBERTS: Your Honor, this is --

18 THE COURT: Go ahead.

19 MS. PERRI ROBERTS: Your Honor, this is Diane Perri
20 Roberts, just on behalf of the defendants our office
21 represents, we just wanted to note for the record our
22 continuing objection that being denied the opportunity to
23 depose the plaintiff in person and that we would much prefer
24 that the depositions be delayed several months until an
25 in-person deposition of the plaintiff could take place.

1 THE COURT: I appreciate that but I guess my point
2 is you want to depose the plaintiff first and I'm not
3 prepared to delay all these defense depositions which I think
4 can probably be accomplished without having them being
5 repeated in connection with the Court of Claims litigation.
6 So I'm, in the interest of focusing things to move forward a
7 little bit, that's what I ruled. But certainly I know your
8 continuing objection and I suppose you would have the option
9 to appeal my ruling in front of Judge Sharpe if that's how
10 you feel about it.

11 But so the only other thing that I would suggest
12 you think about, Ms. Rosenfeld, and you know, I know this
13 isn't necessarily consistent with your planned schedule, but
14 if you're talking about deposing these nonparty witnesses in
15 December and if Ms. Levy is going to have a greater interest
16 in participating in those than she might the defendant, you
17 consider, you know, flexibility in waiting until after the
18 first of the year to schedule those so they can be done in
19 one deposition.

20 MS. ROSENFELD: Absolutely. We work very well with
21 Ms. Levy and we had a conversation about the federal versus
22 the Court of Claims one and we'll keep her in the loop on the
23 schedule. She had not raised any concerns to us, so, but we
24 will continue to coordinate with her as you suggest.

25 THE COURT: And to go back to your prior question I

1 think to the point you think there's anything that needs to
2 be communicated to Judge Fitzpatrick, I would suggest that
3 you do that and if for whatever reason she wants to confer
4 with me, I'm happy to do so, but I guess I'm not going to
5 initiate that.

6 MS. ROSENFELD: Understood. Thank you.

7 THE COURT: All right. Ms. Cowan, anything else
8 from you?

9 MS. COWAN: No, your Honor.

10 THE COURT: Ms. Baker?

11 MS. BAKER: No, your Honor.

12 THE COURT: Mr. Mackey?

13 MR. MACKEY: Um, I guess the one thing I would add,
14 your Honor, is with the nine nonparty depositions, I mean my
15 understanding is these subpoenas haven't even been served yet
16 on all these nine deponents, so I guess I'm comfortable
17 saying I doubt these depositions could go forward in
18 December. And to be honest with you, I don't, I don't think
19 I have space in my calendar and I don't think Ms. Roberts or
20 Ms. Covert -- Mr. Covert has space in his calendar to fit
21 these depositions that were just noticed up yesterday. So
22 just to kind of put it out there, I think it would be
23 reasonable to say, at least those depositions, the nonparty
24 is probably something we can't shoehorn in in December or at
25 least early December and it's something that might have to be

1 pushed back a little bit.

2 THE COURT: Yes, and you know, I know the current
3 deadline for fact discovery is December 10th which is,
4 obviously would be a problem, so I guess what I suggested to
5 Ms. Rosenfeld and she seemed amenable to that is to feel,
6 she's going to feel out Ms. Levy as to whether or not she
7 would want to participate in the nonparty witness depositions
8 and whether those could be scheduled, you know, shortly after
9 the first of the year, probably remotely so that those
10 weren't duplicated. Because you know, my sense is other than
11 the plaintiff's deposition, the named defendants'
12 depositions, I think notwithstanding the fact that they're
13 two lawsuits, could probably be done once and not have to be
14 repeated with the one caveat that I mentioned with respect to
15 Graham and Mitchell.

16 MR. MACKEY: Okay.

17 THE COURT: All right. Anything else,
18 Ms. Rosenfeld?

19 MS. ROSENFELD: No, your Honor, thank you for
20 giving us so much of your time today.

21 THE COURT: Yes, and you're going to have a meeting
22 tomorrow and then you're going to take up more of it, aren't
23 you?

24 MS. ROSENFELD: Maybe not. Hopefully we'll be
25 very -- we'll resolve everything.

1 THE COURT: Hope springs eternal. All right,
2 everybody stay safe.

3 MS. ROSENFELD: Thank you, your Honor.

4 (Proceedings Adjourned, 3:51 p.m.)
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